

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

982

No. 20996

FREDERICK A. SCOTT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT OF COLUMBIA
COURT OF APPEALS

United States Court of Appeals
for the District of Columbia Circuit

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JURISDICTIONAL STATEMENT

This appeal is from a conviction on a charge of receiving stolen property, value less than \$100.00 - Title 22, Section 2205, D.C. Code (1961 ed.). The jurisdiction of the trial court is based upon Title 11, Section 755a, D.C. Code (1961 ed.). The jurisdiction of the District of Columbia Court of Appeals is based on Title 11, Section 772, D.C. Code (1961 ed.). The jurisdiction of this Court is based on Title 11, Section 773, D.C. Code (1961 ed.) and Rule 1 of Title 1 of the Rules of this Court "Governing Review of Cases from the District of Columbia Court of Appeals".

STATEMENT OF THE CASE

A. The Initial Seizure:

On July 16, 1965, at approximately 3:15 A. M., two (2) armed metropolitan police officers - one dressed in uniform and the other one in civilian clothes - went to the areaway in the rear of 912 First Street, Southeast, Washington, D. C., investigating a theft from a tractor-trailer truck located at 80 Eye Street, Southeast, Washington, D. C.

Appellant contended that, during the morning in question, two (2) men - later recognized as metropolitan police officers - knocked on his door and asked for permission to step inside the door for a minute, to which he said "Yes". (Tr. 157-158) ^{1/} The officers did not advise him of his right not to admit them, instead, however, the officer in uniform proceeded straight through his home into the dining room area and placed his hands on some clothes and stated "this is it". (Tr. 158) The officers then proceeded to the rear yard through the back door of appellant's home. It was at this time that appellant contended that he saw two (2) uniformed officers going through his trash cans. (Tr. 158, 173) Appellant, at all times, denied receiving any stolen property or having any stolen property on his premises. (M. Tr. 39)

^{1/} M. Tr. refers to the transcript of the pretrial Motion to Suppress. Tr. refers to the trial transcript.

Appellee contended that observation was made of paper wrappings; address shipping notices; parcels; etc. in the trash receptacles; that although he put his hand on the fence he was not able to place the flashlight through the fence; (M. Tr. 10-12) that although he believed these items to be from the stolen truck, he, nevertheless, sought and obtained admittance into appellant's home; (M. Tr. 11-14, 35-36) that he commenced interrogating appellant as to where he purchased his clothing, etc. (M. Tr. 11-13, 35-36); and, that appellant was subsequently informed of a larceny from a tractor-trailer truck.

After recovering some items from the trash cans and having them placed in the cruiser by other officers, these two (2) officers returned through the house collected other items and departed the premises leaving officers posted at the front and rear of the house for the remaining of the morning. (Tr. 179-181, M. Tr. 25) At approximately 10:00 A. M., on the same date, the officers returned to the premises with a search warrant and subsequently arrested appellant.

Prior to the trial of this case, a Motion to Suppress was heard and denied.

B. Trial

1. At the trial of this case, counsel for appellant moved the Court, prior to the testimony of appellee's first witness, for the suppression of any evidence to be introduced by appellee

concerning the unlawful search and seizure; however, the Court summarily denied Counsel's Motion. (Tr. 9-13) Counsel renewed the Motion to Suppress. (Tr. 25, 143, 144). Immediately prior to the close of appellee's case and after appellant had already been prejudiced by testimony and the introduction of articles to be identified, the Court stated that a hearing without the jury would be held on appellant's Motion to Suppress. (Tr. 143, 144, 146, 149) The Motion to Suppress was not heard without the jury.

2. Instruction on Possession.

Appellant requested the Court to give the following instruction on exclusive possession of recently stolen goods: (Tr. 201-202, 222-223)

"In order to warrant an inference of guilt from the circumstance of possession of recently stolen property, such possession must be personal and exclusive, must be unexplained and must involve a distinct and conscious assertion of property by the defendant. Prather v. State Court of Criminal Appeals of Texas, 81 S.W. 2d 529; Frazier v. State Court of Criminal Appeals of Texas, 81 S.W. 2d 529; Scott v. State, Supreme Court of Nebraska, 236 N.W. 608; State v. Drew, Supreme Court of Missouri, 179 Mo. 315, 78 S.W. 594; and, State v. Bennett, Supreme Court of Rhode Island, 168 A2d 282. (See Mcknight v. United States, 114 US APPDC 40, 41, 309 F2d 660)

This requested instruction was denied by the Court.

The Court gave the following instruction:

"Now, you are instructed that where an Information charges receiving stolen property, unexplained possession in the Defendant of property recently stolen may be evidence of guilt, but any inference from such possession is one of fact and not of law, and it is for you, the jury, alone to determine whether the guilt of a defendant is a reasonable inference of fact fairly deducible from his possession of recently stolen property, and is to be determined by you in the light of all the circumstances, including the reasonableness of the Defendant's explanation, if any, as to how he came by the property.

"If you find that this Defendant was in possession of these goods, which are the subject of the testimony here, and that they had been recently stolen, then you may, if you see fit to do so, infer therefrom that this Defendant is guilty of the offense with which he is charged, unless you find that he has explained to your satisfaction his possession of the goods in question, on the date in question; and under the circumstances stated.

"You are further instructed that if you find the Defendant had possession of recently stolen property, such possession can, in the absence of satisfactory explanation, give rise to an inference of guilt of receiving stolen property. As I have stated, this is a question of fact to be determined by you, the jury.

"Now, to have possession of something, means to have dominion and control over it. Possession may be either actual or constructive, and if the evidence establishes the necessary power in the Defendant to control something, immediate, physical custody or manual or personal, physical possession is not necessary in order for the Defendant to have possession of it. It is for you, the jury, to determine whether the evidence in this case shows that the Defendant had possession of the articles in question." (Trial Tr. page 218, lines 1-12, 18 through and including page 219, line 15) (Emphasis supplied)

Following an extended discussion at the bench and recognizing the position that the Court was determined to take and did take with regard to the afore-mentioned requested instruction, Counsel for appellant unwittingly yielded his position. However, following the giving of the instructions and recognizing the Court's clear error in its instructions on "Reasonable Doubt", counsel for appellant informed the Court of this error and again objected to the Court's instructions concerning possession and attempted to prevail upon the Court to recognize its error in its failure to give the instruction on exclusive possession, however, without success. (Trial Tr. page 201, page 203, page 223.)

A petition for allowance of an appeal and a Motion For Leave To Proceed Without Prepayment of Cost was filed in this Court on April 28, 1967. Said Motion to Proceed Without Prepayment of Cost was granted on May 17, 1967. Said Petition For Allowance of an Appeal was granted in an Order entered on August 4, 1967.

STATUTES, REGULATIONS AND RULES INVOLVED

Title 22, District of Columbia Code, Section 2205, provides:

"Any person who shall, with intent to defraud, receive or buy anything of value which shall have been stolen or obtained by robbery, knowing or having cause to believe the same to be so stolen or so obtained by robbery, if the thing or things received or bought shall be of value of \$100 or upward, shall be imprisoned for not less than one year nor more than ten years; or if the value of the thing or things so received or bought be less than \$100, shall be fined not more than \$500 or imprisoned not more than one year, or both. (Mar. 3, 1901, 31 Stat. 1324, ch. 854, §829; June 29, 1953, 67 Stat. 98, ch. 159, §214.)

STATEMENT OF POINTS

1) The District of Columbia Court of Appeals erred in holding that the evidence on the Motion to Suppress evidence established that appellant's permission to search without warrant was freely and intelligently given.

2) The District of Columbia Court of Appeals erred in holding that where defendant had hearing before Motions Judge on first Motion to Suppress evidence and did not proffer new evidence or changed circumstances on his second Motion to Suppress when trial commenced, failure to hear second Motion without presence of Jury was not error.

3) The District Court of Appeals erred in holding that where instruction on possession in prosecution for receiving

receiving stolen goods was full and complete, and defense counsel indicated that he would accept court's ruling on the question, refusal to instruct that defendant must have had exclusive possession was not ground for reversal.

SUMMARY OF ARGUMENT

1) Appellant contends that the testimony of Appellee's main and only witness concerning the waiver or consent for their entrance into his home was not supported by clear and positive testimony. That the testimony of appellee's main and only witness on this point discloses contradictions, inconsistencies, lack of knowledge and behavior which are strongly at variance with that which we normally expect of a policeman and which appellant believes raises the doctrine of inherent incredibility. Further, the reasons given by the officers for entering appellant's home was false in as much as appellee's witness testified that he believed the articles that he allegedly saw in the trash receptacles were stolen articles from the shipment. This being true, the only other explanation for the officers desiring to enter appellant's home was to see if any articles were in the house.

2) Appellant contends that after the Court had agreed that it would hear appellant's motion to suppress without the jury, the Court refused to grant said hearing; and, that appellant was compelled to testify on his motion before the jury.

3) Appellant further contends that his requested instruction on exclusive possession should have been granted by the Court; and, that the evidence in this case clearly demonstrated that numerous persons, other than appellant, resided on the premises and that the facts in this case as to possession were subject to conflicting interpretations.

ARGUMENT

I THE MOTIONS TO SUPPRESS SHOULD HAVE BEEN GRANTED.

Appellant contended that a warrantless search of his trash receptacles and his home without his consent constituted a violation of his rights under the Fourth Amendment to the Constitution of the United States. Appellee contended that there was no search of the receptacles, prior to their entering appellant's home, and that they informed appellant of his rights not to admit them into his home.

In its decision (Frederick H. Scott v. United States, 228 A.2d 637 (April 19, 1967)) the District of Columbia Court of Appeals stated:

"All this evidence was considered by a pre-trial motions judge and again at trial. In both instances the policemen's testimony was given credence and the motions to suppress were denied".

However, it is noted that the Court failed to consider independently the question of credibility although this question was argued at the hearing. It is recognized that this question is normally determined by the trier of fact except in those instances wherein the testimony of the main and only witness of one of the parties is so incredible as to raise the doctrine of inherent incredibility. Support for this authority is found in Jackson v. United States, 122 USAPPDC 324, 356 F2d 862, (1965), wherein this Court stated:

"The doctrine that appellate courts must reverse findings based upon 'inherently incredible' testimony has long been accepted in this jurisdiction. Sometimes, it is possible to disprove testimony as a matter of logic by the uncontradicted facts or by scientific evidence. (case cited) But the doctrine of inherent incredibility does not require such positive proof. It is enough to invoke the doctrine if the person whose testimony is under scrutiny made allegations which seem highly questionable in the light of common experience and knowledge, or behaved in a manner strongly at

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variance with the way in which we would normally expect a similarly situated person to behave."
[Emphasis supplied]

A cursory review of the testimony of Officer Edgar L. Seibert, Metropolitan Police Department, the main and only witness for appellee on these points, discloses contradictions, inconsistencies, lack of knowledge and behavior which are strongly at variance with that which we normally expect of a policeman.

The Officer testified at the hearing on the pre-trial motion to suppress, that during his routine checking of the area, he went to the 80 Eye Street, Southeast, address.

(M. Tr. 3-4) At the trial, however, the Officer contradicted himself and stated that he received a radio run to meet the Officer on the beat at the 80 Eye Street address. (Tr. 14) Again during the pre-trial motion, the Officer stated that there was no access from the rear areaway into the rear yard of appellant - thus concluding that they could not have possibly entered into appellant's rear yard without having to go through his house. (M. Tr. 9, 32, 35, Tr. 19, 52, 60, 166) Yet at the trial, he testified that there was a break in this fence at the same spot as testified to by appellant. (Tr. 165, 166) An Officer is generally more thorough in observing entries and exits than apparently was Officer Seibert.

During the pre-trial motion, the Officer testified that he was not aware of a side areaway extending from the front of appellant's home into the rear yard - which areaway lies between appellant's home and his neighbor - and opens into appellant's rear yard. (M. Tr. 32, 35-36) Yet, Lt. Rogovsky, whom Officer Seibert testified that he was with at all times during the morning in question testified:

"Q. Is there an areaway coming down between Mr. Scott's house and the other house next to him?

A. There is.

Q. From the front to the back?

A. There is." (M. Tr. 57)

Officer Seibert testified that there was no access from any of the other houses on either side to the rear areaway where he was standing. (M. Tr. 9) Yet, the Lieutenant testified that:

"Q. Where was the other officer?

A. I don't know whether he was in the rear -- in the yard in the rear of 912; opposite 912 on New Jersey Avenue.

Q. You don't know --

A. There is an open yard there. I believe he was in the open yard.

Q. Next to 912:

A. Opposite 912. It would be a New Jersey Avenue address." (M. Tr. 57) [Emphasis supplied]

Which again shows that Officer Seibert's testimony was less than clear and positive. That he was not very observant as an Officer is generally expected to be.

Further testimony by Officer Seibert was that he and Lt. Rogovsky were the only officers present in the areaway behind appellant's home during the early morning hours on July 16, 1965; and that officers were sent to the rear of - outside of the back-yard of - appellant's home at the time he and the Lieutenant went to appellant's front door. (M. Tr. 25, 34, 38, 39) Yet Lt. Rogovsky testified that:

"Q. Officer, were there any -- officers other than you and Officer Seibert in the rear of 912 First Street, Southeast, outside of the yard, at any time during the morning of July 16th before you and Officer Seibert went into the home?

A. Before we went into the home?

Q. Before you went into the home.

A. There were other officers there.

Q. I beg your pardon?

A. Yes, sir.

Q. How many were there?

A. There were two other officers there." (M. Tr. 53-54)

On direct examination, Officer Seibert testified that:

"I then asked -- informed the defendant that we had been in the premises -- in the airway in the rear of his yard, and I told him that I had observed parcels in the trash cans with Sears Roebuck label on same, and asked him if he knew anything about it."

(M. Tr. 12) [Emphasis added] On cross-examination the Officer testified:

"Q. I see. What were the names of the Officers who were in the backyard of the defendant on the morning that you were at his house?

A. (Pause) -- I don't recall at this time.

Q. How many officers were in his back yard?

THE COURT: Now, this is rather an important point. When do you mean they were in this back yard?

MR. HILL: I beg your pardon?

THE COURT: At what point are you referring to when you say "How many officers were in the back yard?" At what point are you referring to in the stage of this --

MR. HILL: The morning of the 16th at 3:15 A. M. when Officer Seibert and Lt. Rogvsky went to the defendant's home.

BY MR. HILL:

Q. At that time, what were the names of the two officers in his back yard?

A. Lt. Rogovsky and Detective Seibert.

Q. Other than --

THE COURT: Just a minute! Let's get this clear. You mean before you went to the front door and knocked on the door --

THE WITNESS: Yes, sir.

THE COURT: -- there were at that time two officers in the back yard?

THE WITNESS: No, sir; there were no officers.
[Emphasis supplied] (M. Tr. 32-33)

Officer Seibert first admits that he and the Lt. were in the rear yard prior to going to appellant's front door and then denies in the same breath that he and the Lt. or any other officers were in appellant's rear yard. Yet the foregoing testimony of this officer clearly shows that he was in the rear yard prior to entering appellant's front door and further supports appellant's testimony that when he (appellant) reached his rear door he saw two (2) uniformed officers going through his trash cans which had been dumped on the ground. (Tr. 158)

Officer Seibert testified that he requested appellant to permit them to search the upstairs portion of the house and that appellant denied them permission to enter his upstairs. This, appellee contends, support their contention that appellant was aware of his rights and freely and voluntarily gave his consent for the policemen to enter his home. (M. Tr. 25) Yet, Lt. Rogovsky stated that no indication was given as to their desire to see anything else in the house; nor that they had suspected any other items being in the house; and, that they had no intentions

of going upstairs. (M. Tr. 61) Again, Officer Seibert's testimony is in complete contradiction to that of his superior. And it was Officer Seibert's testimony on which the Government relied to support its contention that free and voluntary consent was given by Appellant.

The question of the credibility of Officer Seibert's testimony would naturally raise the issue as to whether the alleged consent to enter into and search the home of appellant was freely and intelligently given.

The District of Columbia Court of Appeals stated in Scott v. United States, Supra:

"That the permission was freely and intelligently given is buttressed by appellant's subsequent refusal to allow a search of the upstairs area and his summoning of counsel when the search warrant was executed later the same day.

"Considering the testimony as a whole, it cannot be held as a matter of law that there was lack of consent, even if appellant knew the entry would disclose damaging evidence. United States v. Gorman, 355 F2d 151, 158-9 (2nd Cir. 1965)"

The District of Columbia Court of Appeals places great emphasis upon the statement of Officer Seibert to the effect that Appellant denied the Officer's admittance to the upstairs area of his home.

The validity of this statement of Officer Seibert must be based on the inherently incredible testimony of this Officer since Lt. Rogosvsky, as previously stated, testified that no request was made to search upstairs. This statement of Officer Seibert is further questionable since the Officers stated that they found stolen items in plain view on the first floor of the house. Yet, they contend that appellant voluntarily admitted them into his home where these very same items were in plain view. It would seem that if the denial of admittance to the second floor is true because of fear on appellant's part of the officers finding any items, as is inferred in the District of Columbia Court of Appeals opinion, it would naturally follow that appellant did not voluntarily admit these officers to the first floor of his home. Further, the subsequent calling of counsel in no way supports the position of appellee that appellant was aware of his rights at the time the Officers approached his front door at 3:00 A. M. For if he, (Appellant) as contended by appellee, admitted them freely and voluntarily without a search warrant at 3:00 A. M., it would follow that he would know that the subsequent search carried with it the power and dignity of the Court since he would have obviously seen the name of the Judge issuing the document. The most reasonable explanation for the calling of counsel was that appellant was still under fear from the previous search.

As stated by this Court on many occasions, from Judd v. United States, 89 US App DC 64, 190 F.2d 649 (1951) to and including Williams v. United States, 105 US App DC 41, 263 F.2d 487 (1957), in order for the Government to rely on waiver or consent for entry into a private home by police officers without a warrant:

" . . . such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. (cases cited) The Government must show a consent that is unequivocal and specific; (cases cited) freely and intelligently given." Judd v. United States, supra, and referred to in Williams v. United States, supra.

This Court stated in Higgins v. United States, 93 US App DC 340, 341, 209 F.2d 819 (1954), involving the question of consent, that:

"Words or acts that would show consent in some circumstances do not show it in others. 'Non-resistance to the orders or suggestions of the police is not infrequent; true consent, free of fear or pressure, is not so readily to be found.' Judd v. United States, 89 US App DC 64, 66, 190 F.2d 649, 651. If a valid confession precedes a search by police, permission may show true consent to the search But no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. It follows that when police identify themselves as such, search a room, and find contraband in it, the occupants words or signs of acquiescence in the search, accompanied by denial of guilt, do not show consent: . . ."

[Emphasis supplied]

Appellant, at all times, denied receiving any stolen property or having any stolen property on his premises.

(M. Tr. page 39)

It is to be noted that Officer Seibert testified that at the time he observed the articles in the trash cans and prior to their going to appellant's front door he believed that those were stolen articles from the shipment. (Emphasis supplied) (M. Tr. 35-37) Notwithstanding the foregoing and without presenting this information to a magistrate, and without setting forth any compelling reasons or exceptional circumstances for not presenting this matter to a magistrate, the Officers entered appellant's home to further examine what they already knew and attempted to justify their entry on the tenuous theory that appellant, with full knowledge of his constitutional rights, waived his rights to deny the officers to enter his home. In Agnello v. United States, 269 U.S. 20, 32, 33, 46 S.Ct. Rep. 4, 70 L.Ed. 145, (10/12/25) which involved the search of a house substantially removed geographically from the place of arrest at a time not substantially contemporaneous with the arrest, the United States Supreme Court stated:

"The protection of the Fourth Amendment extends to all equally - to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. (Emphasis supplied)

"Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant. Absence of any judicial approval is persuasive authority that it is unlawful Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause" [Emphasis supplied]

Also in Johnson v. United States, 333 U.S. 10, 13, 14, 68 S. Ct. Rep. 367 92 L.Ed. 436, (2/2/48) which involved the validity of the arrest and search of petitioner's living quarters. The Court stated:

"Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding an intentional waiver of a constitutional right." [Emphasis supplied]

"At the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant."

The Court stated that no suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with

removal or destruction, and:

"If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required". Johnson, supra.

The Court further stated:

"... If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character." Johnson, supra.

Here, Officer Seibert testified that he believed, prior to going to appellant's front door, that the articles in the trash receptacles to be stolen from the tractor-trailer truck -- fumes will in time disappear, as referred to in the Johnson case, supra., -- but with the two (2) uniformed officers stationed in the area-way, these articles in the present case would not disappear.

The only other explanation for the Officers desiring to enter appellant's home, since they already knew what was in the trash receptacles and there were entries into the rear yard without having to go through the house, and as subsequently shown they posted guards around the premises for the remaining of the night, was to see if any articles were in the house. Thus, the reason

allegedly given to appellant by the Officers was false.

(M. Tr. 12-13) The Courts have stated that:

" . . . the police may not invade a private home by stealth. Gouled v. United States, 255 U.S. 298, 305 (1921). Nor may the police . . . invade the privacy of a dwelling through falsehood. Gatewood v. United States, 93 US App DC 226, 209 F2d 739 (1953)" Williams v. United States, supra., Circuit Judge Danaher's concurring opinion. [Emphasis supplied]

II MOTION TO SUPPRESS OUTSIDE OF THE JURY.

Counsel for appellant moved the Court, at the beginning of the trial and prior to the testimony of appellee's first witness, for suppression of any evidence to be introduced by appellee concerning the unlawful search and seizure; and what the officers observed and seized as a result of the violation of the Fourth Amendment to the Constitution of the United States. However, the Court summarily denied Counsel's motion. Counsel renewed the motion to suppress. (Tr. 25, 143, 144) Immediately prior to the close of appellee's case, and after appellant had already been prejudiced by testimony and the introduction of articles to be identified, the Court stated that a separate hearing outside the presence of the jury would be held on appellant's motion to suppress. (Tr. 143 149) The record clearly shows that not only did the Court not hold a separate hearing on the Motion but compelled

appellant to testify on his motion before the jury. This is manifested in the Court's ruling, before the jury, on appellant's motion and his objection to the admissibility of testimony as well as evidence . (Tr. 197, 198)

The trial court's denial of appellant's request for a hearing on his motion outside of the presence of the jury created a situation pregnant with prejudice to the appellant. The jury is a body of men and women called upon to serve the significant but limited function of making determinations of fact. Their backgrounds and qualifications to sit as jurors in no way prepare them to consider intelligently the complex Constitutional issues presented by a motion to suppress evidence. There is the inherent and very considerable danger that when permitted to attend proceedings in which they exercise no legitimate function, jurors, no matter how well-intentioned they may be, will place too much weight on a particular point or even worse, will draw many unjustifiable inferences from the trial judge's position on a Constitutional question. More explicitly, the jurors are likely to be impressed with the ruling of the court, with all of its prestige, as to view as suspect any other evidence proffered by the party failing on the motion.

Applicant was also prejudiced because he was effectively compelled to testify in the presence of the jury. That is, it was necessary for the appellant to give testimony if he was to have a chance to prevail upon his motion to suppress, yet, by doing so, in the presence of the jury, he was forced to place in jeopardy his privilege against self-incrimination. In Wright v. United States, 102 US App DC 36, 45, 250 F.2d4(1957), concerning the question of the voluntariness of a confession, the Court stated:

"The Court refused Wright's request for a preliminary hearing on the question of the voluntariness of his confession and submitted the question to the jury. This was error.

"To substantiate a defendant's contention that his confession was involuntary, it is generally necessary for him to take the stand. Since it is a matter of course that the defendant should be allowed to testify to the involuntariness of his confession without waiving his privilege against self-incrimination, 3 Wigmore, Evidence 345 (3d Ed. 1940), it follows that, when he requests it, he should be given a hearing without the jury."

"The majority rule is that the question of voluntariness is for the Court alone to decide . . ." [Emphasis supplied] Also see Bray v. United States, 113 US App DC 136, 306 F.2d 743 (1962).

While in the present case the jury was not called upon to decide the motion (as it was called upon in Wright to decide the issue of voluntariness), nevertheless, it was permitted to listen to testimony and to observe demeanor, and this extra-trial knowledge may have had great bearing on those factual determinations the jurors were entitled to make, the most important of which was guilt. The point most urgently to be advanced here is that the jurors were performing no legitimate function in witnessing these proceedings but were presented with the opportunity to forfeit their impartiality through the application, conscious or unconscious, of extra-trial knowledge. By way of analogy, if a juror had been present at the time of the appellant's arrest or at the hearing of the pre-trial motion to suppress evidence and had admitted to such presence during the voir dire, then clearly counsel for appellant or appellee would have been on firm foundation in challenging such a juror for cause, the cause being that the prospective juror's extra-trial knowledge of the case renders his presence on the jury inherently prejudicial. It would be to avoid the obvious to seriously contend that the same type of prejudice does not inhere when a juror already empaneled obtains extra-trial knowledge. Such a situation may only be avoided, and the Constitutional requirement of trial by a fair and impartial jury may only be safeguarded by ordering a hearing on a motion, such as that herein, out of the presence of the jury.

It must also be noted that there is no satisfactory reason for not excluding the jury in such a situation. No expense and no delay would have resulted. Appellant's counsel's objections to the manner of hearing the motion were voiced often and clearly. Indeed, the merit in the appellant's position is supported by the trial judge's statement that he would exclude the jury. No reason was offered for not having done so.

The District of Columbia Court of Appeals relied upon Rouse v. United States, 123 U.S. App. D.C. 348, 359 F.2d 1014 (1966) in dismissing appellant's contention that the second motion to suppress should have been heard without the jury present, stating that the appellant "had one earlier hearing before the Motions Judge and no new evidence or changed circumstance was proffered." Yet, the trial Judge's denial of the hearing out of the jury's presence cannot be thus supported, for he did in fact say that he would have the jury leave the room and so he must have found that some evidence or circumstance existed which would justify his ruling and in fact such was the case: the defendant, now the appellant, was to testify at the hearing of the second motion but did not do so at the hearing of the first (Tr. 144, 146, 147) and the officers' testimony at the hearing of the second motion was replete with contradictions. The trial judge's failure to give effect to his ruling seems inexplicable in the light of Rouse

and in view of the circumstances of the case.

III INSTRUCTION ON EXCLUSIVE POSSESSION

To be guilty of the crime of receiving stolen goods one must be in possession of those goods. The degree of that possession is the crux of appellant's case.

The usual rule is that unexplained possession of recently stolen goods can support an inference by the jury that the possessor is guilty of the crime of receiving stolen goods.^{2/} In McKnight v. United States, 114 U.S. App. D.C. 40, [309 F.2d 660, (1962)] this Court, per Bazelon, C.J., stated that " . . . if the jury found exclusive possession by the defendant of recently stolen goods it could, but was not required to, find that defendant had stolen the goods." (at page 41, emphasis original) It is the obverse of that axiom that appellant feels must be more clearly articulated: to wit, that common possession (in this case there is no evidence as to who has possession) of recently stolen goods is sufficient for a jury to find that the single defendant is not guilty of the crime of receiving stolen property. The failure of the trial judge below to clearly instruct the jury on the ex-

^{2/} See: Rivera v. United States, 124 U.S. App. D.C. 99, 361 F.2d 553 (1966); McKnight v. United States, 114 U.S. App. D.C. 40, 309 F.2d 660 (1962); Barfield v. United States, 229 F.2d 936 (5th Cir., 1956); Inman v. United States, 100 U.S. App. D.C. 150, 243 F.2d 256 (1957); Robertson v. United States, 124 U.S. App. D.C. 309, 364 F.2d 702 (1966).

clusiveness of possession clearly resulted in appellant's erroneous conviction.

In Rivera v. United States, 124 U.S. App. D.C. 99, 361 F.2d 553, (1966) this court declined to overturn a conviction because trial counsel did not clearly articulate to the trial court the instruction desired. The present case is clearly distinguishable from Rivera because the desired instruction was clearly articulated below. In the dissent to Rivera, it was stated that:

"It is well established that [I]n criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. ^{3/}

More striking is the following statement that was noted in Rivera:

"The government requested and the trial court charged the jury that: [T]here is a principle of law that if the defendant is found to be in unexplained exclusive possession of stolen property shortly after the commission of housebreaking or larceny, this circumstance is an evidential fact which the jury may consider and which may satisfy the jury that the possessor of the articles is the thief and may in itself warrant a verdict of guilty" [emphasis original]

Apparently then the United States Attorney's office has felt, at least in one case, that the possession of stolen property must be exclusive possession in order for it to be considered by a jury.

^{3/} 124 US App. D.C. 99, at 101 citing: Tatum v. United States, 88 U.S. App. D.C. 386, 391, 190 F.2d 612, 617 (1951). See also Collazo v. United States, 90 U.S. App. D.C. 241, 246, 196 F.2d 573, 578, cert. denied, 343 U.S. 968, 72 S.Ct. 1065, 96 L.Ed. 1364 (1952).

It would appear that, assuming the statements in Rivera to be accurate presentations of the law in the District of Columbia, an instruction on exclusive possession should have been presented to the jury below.

In the case of Barfield v. United States, 229 F.2d 936 (5th Cir., 1956) it was stated at 941 that:

"We think the Trial Judge must take great pains to make certain that the jury understands what is required to be possession as well as those factors which they must take into account to determine whether there can be a rational influence."

The crime of receiving stolen goods is a crime which, for the most part, has received the greatest judicial scrutiny at the state level where it is a more common occurrence and where the vast majority of prosecutions take place. In State v. Bennet, 168 A.2d 282 (R.I. 1961) the Rhode Island Supreme Court stated at p. 286:

"The mere showing that a defendant was in constructive possession will not warrant an application of this rule." (That unexplained possession is sufficient to infer guilt) See also State v. Boudreau, 16 A.2d 262 (Vt. 1940).

In the instant case, all that was presented was the mere fact that the appellant was in constructive possession of the stolen property. All that was shown was that the property was stolen, that the property was found at a certain address and that the appellant was the lessee of the premises. It is submitted that the three stated facts are not sufficient to sustain appellant's conviction.

The Texas State Court enunciated the requirement of proof more explicitly in Prather v. State, 81 S.W. 2d 528, 529 (Texas 1935):

"In order to warrant an inference of guilt from the circumstances of possession of recently stolen property such possession must be personal and exclusive, must be unexplained, and must involve a distinctive and conscious assertion of property by the defendant."

From Prather, then we see the four elements that constitute the crime of receiving stolen property. The possession must be: 1) personal, 2) exclusive, 3) unexplained and 4) accompanied by a conscious assertion of the property. In applying the four elements to the facts of the instant case, it is clear that the elements have not been proven and that the conviction must fail for lack of sufficient evidence. Points 1 and 2, which may be considered as one, have clearly not been proven. In the premises at 912 First Street, Southeast, there lived, in addition to appellant, appellant's wife, their seven (7) children (including two teenage girls) and tenants consisting of a husband and wife named Gibson together with their four children; 15 people lived in the house at 912 First Street, Southeast. Yet, the police charged only one man with the crime of receiving stolen property. The reason that appellant was charged is conjecture at this point. It is submitted though that the reason was simply that appellant was unfortunate enough to have answered the door in the early morning of July 16, 1965. At the trial, there

was no showing that the possession was either exclusive or personal. It should be noted that of the items stolen, only the adding machine was of any real value, and the garments were for the most part ladies' clothes. The adding machine was in the trash - discarded as worthless. If appellant were the true receiver of the stolen goods would it not make more sense for him to hold on to the adding machine rather than the clothes. The adding machine was worth more than all of the contraband found in the house - yet, the adding machine was abandoned. It is submitted that a more reasonable explanation is that a woman, assuredly not the appellant, found the stolen property and then chose those items which she felt she could use and then discarded the others. Certainly if appellant were the truly guilty party, he would have kept the adding machine because of its greater resale value. Clearly appellant was in neither personal nor exclusive possession of the goods found within the premises; he certainly cannot be considered to be in personal and exclusive possession of those items found in the yard.

Point 3 is conceded. There is no doubt that the stolen goods were found on the premises and that their presence is unexplained. Equally unexplained is how the goods got to the premises and who, if anyone, received them. From the amount of people residing at the premises, it is difficult to see how appellant can be singled out as the guilty party.

Point 4 clearly has not been shown. One need only refer to the trial transcript to see that appellant never asserted ownership - at pages 182 and 183 there are assertions of ignorance but never are there assertions of ownership.

In its opinion below, the District of Columbia Court of Appeals noted that at one point appellant's trial counsel stated with regard to an instruction on exclusive possession that he would accept the trial Judge's ruling to leave the question to the jury. (Tr. p. 202) Trial counsel certainly did not intend to waive his request on exclusive possession; this unwitting mental lapse can best be attributed to the pressures of the trial itself. In any event, from the colloquy that took place on the following day during the charge to the jury (Tr. p. 222-223), it can be seen that trial counsel once again sought an instruction on exclusive possession only to be rebuffed by the trial judge who thought the word "exclusive redundant (Tr. 222). Appellant concedes that "exclusive possession" is redundant where only one individual can be said to be in possession. Appellant maintains, however, that where more than one individual can possibly be in possession then the term "exclusive possession" is not a needless redundancy, rather it is a necessary clarification.

Even assuming a waiver by trial counsel this court, in Tatum v. United States, 88 U.S. App. D.C. 386 (D.C. Cir. 1951), has noted, at p. 388:

Ordinarily, failure of counsel to record his exceptions to the charge would constitute a waiver of the points not raised. It has always been the custom of this court, however, in cases of serious criminal offenses, to check carefully the record for error prejudicial to defendant which he did not urge. (citing cases)

And further at p. 389:

Failure on the part of a trial court in a criminal case to 'instruct on all essential questions of law involved in the case, whether requested or not' would clearly affect substantial rights within the meaning of Rule 52(b).

The District of Columbia Court of Appeals (228 A.2d 637, 639) cited Fletcher Smith v. United States, 123 U.S. App. D.C. 259, 359 F.2d 243 (1966) and Bray v. United States, 113 U.S. App. D.C. 136, 306 F.2d 743 (1962) in its opinion for the proposition that "the exclusive possession instruction is not required." A careful reading of Smith and Bray does not support this contention. In neither Smith nor Bray was the lack of an exclusive possession instruction pressed as grounds for reversal on appeal.

In Smith an instruction was given, unobjected to at trial, that the jury might infer guilt from unexplained use of a motor vehicle. On appeal, Smith contended that the jury should have been further instructed that it was not required to infer guilt from possession.

In Bray, the appellant attacked an instruction on the possession of a stolen automobile. Bray contended that the jury should not have been instructed that they might infer from his possession

of the automobile shortly after it was stolen that he was guilty of the offense charged, which, it should be noted, was not receiving stolen property but was transporting a motor vehicle in interstate commerce knowing the same to be stolen.

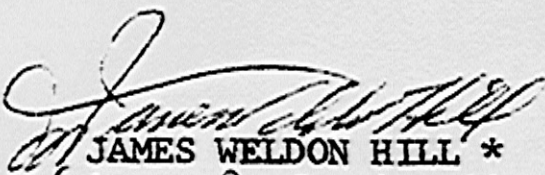
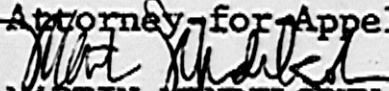
In both Smith and Bray the object stolen was an automobile and each case, as far as the opinions reflect the facts, the individual defendants were arrested while alone in the automobile. Under these circumstances, an instruction on exclusive possession was not necessary because no one else was in the vehicle. The possession in these cases was implicitly exclusive because no one existed to make it non-exclusive.

In sum, " a verdict of guilty in this case required the jury first to find that the stolen goods were in the exclusive possession of the accused." ^{4/}

^{4/} Rivera v. United States, 124 U.S. App. D.C. 99, 101 (1966), citing: Travers v. United States, 118 U.S. App. D.C. 276, 335 F.2d 698 (1964); Barfield v. United States, 229 F.2d 936, 940-941 (5th Cir., 1956); State v. Sullivan, 34 Idaho 68, 199 P. 647, 17 A.L.R. 902 (1921).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the District of Columbia Court of General Sessions should be reversed.


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- * The attorneys for appellant would like to thank a volunteer who cannot sign the brief, Abraham J. Greenstein, a senior law student at the George Washington University Law School, for his invaluable research prior to the preparation of this brief.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant has been served personally on the Office of the United States Attorney for the District of Columbia, at the United States Court House, 3rd and Constitution Avenue, N. W., Washington, D. C., this 29th day of September, 1967.


JAMES WELDON HILL

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 20,996

FILED DEC 12 1967

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DEC 11 1967

CLERK OF THE UNITED
STATES COURT OF APPEALS

FREDERICK A. SCOTT, APPELLANT

Nathan J. Paulson

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
EDWARD T. MILLER,
SCOTT R. SCHOENFELD,
Assistant United States Attorneys.

DCCA No. 4101

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. May appellant urge as inherently incredible testimony accepted by the court and jury below in order to claim error in denial of a motion to suppress, where the testimony showed that police officers on public space observed stolen goods abandoned in open view in appellant's yard, and they entered the premises with appellant's expressed consent to seize them?

2. Did the court abuse its discretion in hearing appellant's evidence on the motion to suppress concurrently with his trial testimony, where the pretrial motion had already been denied, appellant proffered no new evidence or changed circumstance, and appellant desired to take the stand in his own defense in any event?

3. Was the court's refusal to grant appellant's own written version of an instruction on the inference to be drawn from "exclusive" possession of stolen property error, where his instruction itself was erroneous, and the instruction given properly set forth the law as to the meaning of "possession"?

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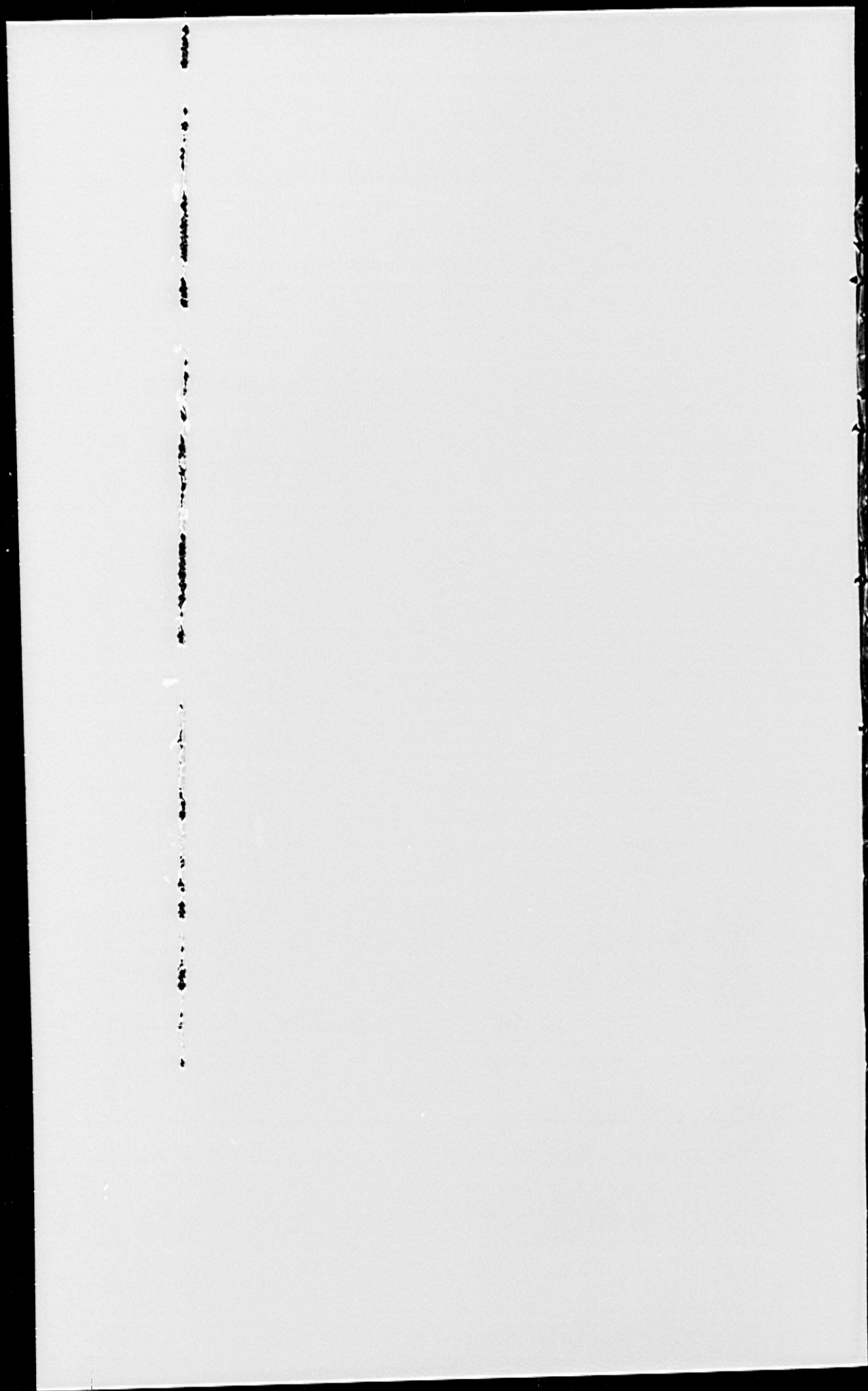
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,996

FREDERICK A. SCOTT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On December 13, 1965, almost six months after the offense, appellant was tried to a jury before Judge Charles A. Halleck in the D.C. Court of General Sessions on a charge of receiving stolen property (22 D.C. Code § 2205). He was found guilty as charged after a three-day trial and was sentenced to six months' imprisonment. Appellant appealed to the D.C. Court of Appeals urging the same grounds presented here. That court affirmed. This Court subsequently agreed to hear the present appeal.

The Motion to Suppress

Prior to trial appellant moved to suppress evidence consisting of certain articles of merchandise, cartons, and wrappings recovered from appellant's house and trash cans. This motion was heard and denied by Judge DeWitt S. Hyde on October 22, 1965. At the motion the Government called a single witness, Detective Edgar L. Seibert, Fifth Precinct, Metropolitan Police Department. Appellant called only Lieutenant Samuel Rogovsky, also of the Fifth Precinct, and appellant himself did not take the stand.

At the pretrial motion Detective Seibert testified on direct examination that in the early morning hours of July 16, 1965, he had investigated the breaking open of a tractor-trailer belonging to Sears, Roebuck and Company, located at 80 Eye Street, S.E., and the theft of some of its contents occurring sometime after 4:30 p.m. on July 15 (M. Tr. 4, 26).¹ Acting on the basis of information that property stolen in a prior similar theft had been stored in the rear of 912 First Street, S.E., he immediately proceeded to the public areaway behind that address (M. Tr. 8-9).² By shining a flashlight through a high chain-link fence, he was able to observe in uncovered trash cans located in the rear yard of that address certain wrappings and a parcel of a color, labeling, and Sears marking similar to those observed in the trailer (M. Tr. 10-11). He then noticed a movement in the house and, having observed no access to the yard from the rear areaway, went with Lieutenant Rogovsky and knocked on the front door of the 912 address (M. Tr. 9, 11).³

¹ "M. Tr." refers to the transcript of the motion to suppress before Judge Hyde on October 22, 1965. "Tr." refers to the transcript of the trial before Judge Halleck and a jury on December 13, 14 and 15, 1965.

² Detective Seibert later testified he arrived at appellant's address about 3:15 a.m. (M. Tr. 32).

³ At trial Detective Seibert stated that he had revisited the area following the motion and then first observed a *side* areaway and a

Appellant immediately opened the door (M. Tr. 11). The officers identified themselves and obtained appellant's name. Briefly, they informed him of the larceny and of their observing Sears goods in his trash cans, and inquired where he did his clothes shopping. Appellant denied knowledge of any such goods and stated he did not shop at Sears. (M. Tr. 12.) The officers requested permission to pass through the house to examine the items in the cans, advising appellant at that time that they had no right to enter without his permission and making sure he understood (M. Tr. 13-14). Appellant stated he did not object to their coming through and that he would help in any way he could (M. Tr. 14). The two officers entered and went with appellant directly to the rear yard, through the living room, middle or dining room, and kitchen (M. Tr. 15). In the yard they removed from the cans some paper wrappings and a carton which contained an adding machine marked as Sears property, all of which was introduced in evidence at trial (M. Tr. 16-22; Tr. 198). Appellant denied knowledge of the items (M. Tr. 22).

The officers then reentered the house to make their exit from the premises (M. Tr. 22). In the middle room they saw a woman's dress on the table, neatly folded and with a Sears label clearly visible as they passed (M. Tr. 22-23). They also saw two shoeboxes with Sears labels visible on a cabinet in the same room (M. Tr. 24). Appellant denied knowledge of these items being there and stated that, if the goods were stolen, he did not want them in his house and he would appreciate the officers removing them (M. Tr. 23-24). The officers asked if they might look upstairs for more Sears items not belonging to appellant. Appellant refused them permission to do so without a search warrant. Thereupon the officers left. (M. Tr. 25.)

break in the fencing (Tr. 56-57). It was never made clear even by appellant's testimony whether there was in fact an access from the rear areaway into appellant's rear yard. See Tr. 165-176.

After conferring with the informer and learning that he had seen appellant carry parcels into the house between 11 and 11:20 a.m. on July 15, the officers obtained a search warrant which they executed about 10:30 a.m. on the 16th (M. Tr. 25-27). More goods belonging to Sears and disclaimed by appellant were discovered and seized at that time from the second floor rooms occupied by appellant's family (M. Tr. 28; Tr. 192), and appellant was arrested at the time of the officers' departure about 12:20 p.m. on the 16th (M. Tr. 30).

Cross-examination of Detective Seibert brought out that, although he was armed, his weapon was concealed from view (M. Tr. 38). He also stated that there were other officers in the area, though only he and Lieutenant Rogovsky entered the premises during the initial entry and seizures (M. Tr. 38-39).⁴

Lieutenant Rogovsky's testimony on the motion essentially corroborated that of Detective Seibert. He confirmed that only he and Detective Seibert entered the premises though other officers were in the area at various times (M. Tr. 51-54). He also indicated that the appellant had been warned and had refused permission for the officers to go upstairs (M. Tr. 61).

The motions judge, noting that appellant failed to present evidence other than from the second officer, found as a fact that appellant consented to the officers' entry and denied the motion to suppress (M. Tr. 64, 68).

The Trial

At the trial nearly two months later, appellant made a general objection to introduction of the evidence which was overruled with instructions to object specifically at the time evidence was offered (Tr. 12-13). Detective Sei-

⁴ Appellant's brief at 13-15 apparently fails to account for the precise time and place referents in commenting upon the witnesses' testimony in this regard. It should be noted that the motions judge twice was forced to interject in order to clarify defense counsel's questions on these points (M. Tr. 33, 53).

bert was called first by the Government and substantially reiterated his motion testimony, excepting of course that concerning the informer's hearsay. Also, he noted that appellant's attorney was present at appellant's house during the execution of the search warrant (Tr. 41). Three other Government witnesses, none of whom had been to appellant's premises, were called to establish various elements of the crime (Tr. 14, 70, 116). Lieutenant Rogovsky did not testify at the trial.

At the conclusion of the Government testimony, the prosecutor moved the Government exhibits into evidence (Tr. 141). Certain exhibits were admitted without objection (Tr. 141-145). As to those recovered as a result of the police entry and the later execution of the search warrant, appellant objected to their admission and a colloquy at the bench took place between the court and defense counsel in an effort to sort out the specific items objected to (Tr. 143-146). The court indicated that he would exclude the jury and hear appellant's motion if appellant wished, but defense counsel suggested he might simply proceed with his case (Tr. 146). The court inquired if appellant was going to offer any additional evidence (Tr. 146-147). Defense counsel indicated that in any event appellant was going to take the stand at trial and he was unable to proffer any different testimony to be given on the motion (Tr. 146-147). Thereupon the court without further objection reserved ruling on the motion to suppress until the close of appellant's case and the Government rested (Tr. 148).

A motion for judgment of acquittal on the ground that there was no evidence that appellant had exclusive possession of the stolen property was overruled (Tr. 148-149).

Appellant put on Carol S. Fair, his United Planning Organization supervisor, who testified that he was at work from 9 a.m. to 5:15 p.m. on July 15 (Tr. 151-152). Appellant himself then took the stand to testify in his own behalf (Tr. 152). He indicated that his house was occupied by himself, his wife, and seven minor children, and that a man by the name of Gibson with his wife and four

children lived in the second floor rear bedroom (Tr. 154, 192). His testimony differed greatly from that of the Government witnesses. Appellant testified that, although an upstairs light was on, he had been asleep downstairs at the time of the officers' knocks, and he denied opening the door immediately in response to the knocks (Tr. 157, 163). Appellant claimed that the only words said at the door were that one of the officers asked to step inside a minute, and appellant replied that he could (Tr. 158, 163). He said that neither officer advised him of his right not to admit them (Tr. 158), and that he did not even know that the plainclothesman, Detective Seibert, was a police officer since he failed to identify himself (Tr. 159). Then in polished response to his counsel's question as to why he admitted them, appellant said: "Because I thought it was my duty I thought it was my duty because they had the uniforms on" (Tr. 160). Appellant claimed that the uniformed officer, Lieutenant Rogovsky, entered and straightaway made for the dining room where he grabbed some clothes, saying, "This is it"; that this officer opened the back door, called appellant, and that appellant then noticed two more officers already within his fenced yard going through the trash (Tr. 158, 173-174). He said that Detective Seibert did not carry items from the trash through the house, but went out through a break in the fence and gave them to two officers who placed them in an unmarked car (Tr. 180-181). Appellant denied at any time speaking of where he shopped or giving permission to "go through" his trash cans, and claimed that he had not been asked if he knew about the stolen property being on his premises until the officers returned with the search warrant (Tr. 159, 182, 189). He denied any knowledge of the property being on his premises (Tr. 161). Appellant was not examined concerning his refusal of permission to search the upstairs of the house without a warrant. Nor did he mention the fact of the officers being armed. He admitted a prior conviction of petit larceny, which defense counsel attempted to bring out on direct (Tr. 155-157, 196-197).

Following denial of a renewed motion for judgment of acquittal (Tr. 197), the court admitted the four items initially seized by the officers⁵ and the three items recovered under the warrant.⁶ The court indicated that it had given independent consideration to the motion to suppress and was ruling on the basis of the testimony it had heard (Tr. 198).

Instructions presented by the parties were then considered by the court. Appellant requested his own instruction as to exclusive possession of the stolen property (Tr. 201-202). This the court denied. Following further discussion, defense counsel then said: "I think I will accept Your Honor's ruling to present it to [the jury] and leave it to them to decide as to actual possession" (Tr. 202). The court's instruction covered the inference which the jury was permitted to draw from possession of recently stolen property, and defined the meaning of possession (Tr. 218-219). At the close of the instructions appellant renewed his request for an instruction on "exclusive control of the property," which the court denied (Tr. 222).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2205, provides in pertinent part:

Any person who shall, with intent to defraud, receive or buy anything of value which shall have been stolen or obtained by robbery, knowing or having cause to believe the same to be so stolen or so obtained by robbery, . . . if the value of the thing or things so received or bought be less than \$100, shall be fined not more than \$500 or imprisoned not more than one year, or both.

⁵ These were: a carton with adding machine and a paper with label seized from appellant's trash cans (Tr. 26-27); and a woman's knit suit and a box with child's shoes seized from appellant's middle or dining room (Tr. 22-24, 34, 36).

⁶ These were: vacuum bags, a child's slip and a child's dress seized from the upstairs front bedroom (Tr. 41-43).

SUMMARY OF ARGUMENT

I

Relying on a version of the facts that has received no credence below, appellant's main predicate for reversal is a claim that his motions to suppress were erroneously denied because the testimony introduced on behalf of the Government was inherently incredible. This theory of the case simply does not stand up in the face of the careful and unusually extensive exposition of the facts in this General Sessions case. If the circumstances here were unusual, there was nothing unusual, inconsistent or otherwise questionable in the testimony of the Government witnesses. There was here a seizure of stolen property lying abandoned and in open view from public space in the back yard of appellant's premises. Appellant consented to the entry required to accomplish the seizure. There was no unreasonable search or seizure violating appellant's Fourth Amendment rights.

II

Appellant's pretrial motion to suppress evidence was denied after a full hearing. He renewed this motion at trial, but suggested a separate hearing without the jury only at the conclusion of the Government's evidence. His present claim that his renewed motion to suppress proffering no new evidence or changed circumstance should have been heard without the presence of the jury urges an abuse of discretion without substantiating any prejudice. Moreover, when his suggestion was made appellant had already indicated he intended to testify in his own defense in any event.

III

Appellant's final claim that the court erred in declining to give appellant's written instruction on the permissible inference to be drawn from "exclusive" possession of stolen property ignores the detailed, accurate, apt and ac-

cepted instruction given. The meaning of "possession" was fully explained to the jury as was the inference that could be drawn from it.

ARGUMENT

- I. The seizure of stolen property from appellant's trash cans and home was valid, as was the later search and seizure pursuant to a search warrant.

(M. Tr. 3-4, 9-11, 22-24, 25, 33, 49, 53, 61, 64-65, 68; Tr. 14, 18-21, 32-36, 38, 41, 56-57, 159, 191, 195-196, 198)

Appellant's fundamental reliance in his brief⁷ is on his conclusion that the testimony of the police officers at the pretrial motion and trial was inherently incredible.⁸ He argues that the seizure of the stolen articles did not take place as the officers testified but differed in vital respects. Although appellant fails to point out in just what respects he disagrees with that testimony, his statement of the case and argument reveal that he simply adopts without qualification the entire version of the facts given by the petitioner at trial and rejected by the court and jury.⁹ From this he concludes in his brief that the entry was not for the purpose stated to seize visible fruits of crime in the trash cans but instead to search the building through which the officers of necessity had to pass.¹⁰ Appellant's attack on the legal basis of the rulings below consists of a series of quotations from selected cases the application of which to the facts here he seems to regard as self-evident.

We do not think it would be fruitful to reexamine in detail here the testimony of the two police officers in this

⁷ Appellant's Br. 9-22.

⁸ Appellant asserts that the trial judge "failed to consider independently the question of credibility." See Appellant's Br. 10. This assertion is groundless. See Tr. 198.

⁹ Of course, this is not permissible. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

¹⁰ See Appellant's Br. 21-22.

case. The thrust of appellant's appeal is nothing more than a quarrel with the overwhelming weight of facts carefully developed in four days of testimony in this General Sessions case filling about 300 pages of transcript. For appellant boldly urges on this Court the conclusion that the testimony of the police lieutenant and detective was inherently incredible, although two judges of the trial court and twelve jurors have found it credible. But appellate courts have no expertise to review facts. *Berenyi v. Immigration Directors*, 385 U.S. 630, 636 (1967). Such matters are for the triers. *Trimble v. United States*, 125 U.S. App. D.C. 173, 174, 369 F.2d 950, 951 (1966); *Young v. United States*, 114 U.S. App. D.C. 42, 43, 309 F.2d 662, 663 (1962); *Wigfall v. United States*, 97 U.S. App. D.C. 252, 253, 230 F.2d 220, 221 (1956); compare (*Henry W.*) *Jackson v. United States*, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965). This case is unexceptionable on this ground.¹¹

¹¹ Appellant has pointed to no inconsistency in the prosecution's evidence that does not have a plausible explanation in the usual vagaries of time, place, observation and articulation. If there were minor inexactitudes in the witness' descriptions, we think these can only be regarded as the marks of trustworthiness of their authors. Indeed, certain of the difficulties of this trial arose from the confused questioning by appellant's counsel himself, which the motions judge was twice forced to clarify (M. Tr. 33, 53).

We note that appellant has suggested a false or improper basis for Detective Seibert's testimony about how he was called to investigate the Sears truck at 80 Eye Street (Appellant's Br. 11). We submit a likely explanation of what he said may be found in the simple fact that his attention was focused on different aspects of the situation. See M. Tr. 3-4; Tr. 14. Further, Detective Seibert's testimony concerning the entries to appellant's rear yard and the geography of the areaways was obviously dictated by the difficulties of nighttime observation, as is indicated by his corrected testimony after his subsequent visit to the premises (Tr. 56-57). Compare Appellant's Br. 11-13. Similarly appellant's brief apparently fails to account for the precise time and place referents in regard to the location of the other officers on the scene, and it sees discrepancies in the testimony of the two officers about the refusal of permission to go upstairs that exist more in articulation than in fact. See Appellant's Br. 13-15. Such evidence and argument do not impeach this trial.

Appellant argues that the motions and trial courts erroneously denied his motion to suppress evidence seized from his trash cans and the first floor dining room of his home because the evidence was seized in an invalid warrantless search.¹² Among other defects, this argument is bottomed on a foundation which is totally lacking in this case. There was no search. Appellant has failed to distinguish between (a) the right to search based on probable cause and seize articles pursuant to that search, and (b) the right to seize visible fruits of crime.¹³ The facts of this case graphically demonstrate merely a seizure of visible fruits of crime. From public space the investigating officers were able to see and identify stolen property in appellant's open trash cans; after they had with appellant's consent entered the premises and seized it and were exiting by a direct route from the premises, they observed more such property (M. Tr. 9-11, 22-24; Tr. 18-21, 32-36). Such visual observation of fruits of crime in plain sight in trash cans by police officers while performing legitimate functions did not amount to a search, and the officers' seizure of them was reasonable and proper.¹⁴ See,

¹² Appellant's Br. 9.

¹³ See *Rabinowitz v. United States*, 339 U.S. 56, 75 (1950) (dissenting opinion of Frankfurter, J.); *People v. Defore*, 242 N.Y. 13, 18, 150 N.E. 585, 586 (1926) (Cardozo, J.). It is evident that the threshold of constitutional unreasonableness is reached later in the case of mere seizures than searches, perhaps because the threat of arbitrary police action is less. This might be regarded as analogous to the permissiveness given to arrests as opposed to searches on probable cause, even in the home.

¹⁴ Appellant has apparently abandoned his reliance below on the denunciation of the trash can search in *Work v. United States*, 100 U.S. App. D.C. 237, 243 F.2d 660 (1957). In any event, *Work* is distinguished from the present case in several significant respects. There the Court noted that the officers did not know what was hidden by the defendant until they searched for and identified it; here the necessary identification as stolen property took place initially. Thus, there was a search in *Work*; here a mere seizure. See *United States ex rel. Stoner v. Myers*, 219 F. Supp. 908, 911 (E.D. Pa. 1963), distinguishing *Work* on this ground. In *Work* the Court found a "hiding" as opposed to an abandonment; here there can

e.g., *Lefkowitz v. United States*, 285 U.S. 452, 465 (1932), interpreting *Marron v. United States*, 275 U.S. 192 (1927); *United States v. Lee*, 274 U.S. 559 (1927); *Hester v. United States*, 265 U.S. 57 (1924); *Hiet v. United States*, 125 U.S. App. D.C. 338, 372 F.2d 911 (1967); *Ellison v. United States*, 93 U.S. App. D.C. 1, 3, 206 F.2d 476, 478 (1953) ("Nor did mere observation constitute a 'search'"); *Cradle v. United States*, 85 U.S. App. D.C. 315, 316, 178 F.2d 962, 963 (1949), *cert. denied*, 339 U.S. 929 (1950); *United States v. McDaniel*, 154 F. Supp. 1 (D.D.C. 1957), *affirmed*, 103 U.S. App. D.C. 144, 255 F.2d 896, *cert. denied*, 358 U.S. 853 (1958). As well stated by Judge Holtzoff in *McDaniel*:

"[T]he police are not required to close their eyes and need not walk out and leave the article where they saw it. Any other principle might lead to an absurd result and at times perhaps even defeat the ends of justice.

The constitutional provision regulating searches and seizures is intended to protect persons against oppression and not to bring into being numerous technical obstructions against the enforcement of the criminal law. It has been said more than once, for example, that it is not a search to observe that which is open and patent. . . . [It has also been said that] a search warrant is not necessary where the object sought by the search is visible, open and obvious to anyone within a reasonable distance employing his eyes." 154 F. Supp. at 2.

be little doubt that the placing of the articles in the trash, unhurried by pursuing police, manifested an intention to abandon and permanently dispose of them. In *Work* the evidence resulted directly from the illegal entry onto the premises by police; here the crucial evidence was observed prior to any entry and seized as a result of a lawful entry. See *United States v. Minker*, 312 F.2d 632, 635 (3rd Cir. 1962), *cert. denied*, 372 U.S. 953 (1963), distinguishing *Work* as inapposite on that interpretation. Finally, and perhaps most important, in *Work* there was no consent to entry, search or seizure; in the present case, there was a valid consent, see *infra*.

Moreover, there was consent under the prevailing standard in this jurisdiction¹⁵ to the police action undertaken in this case; specifically, to the entry of Lieutenant Rogovsky and Detective Seibert onto the premises and their seizure of evidence from the trash and from the first floor dining room.¹⁶ This is a case in which the relative credibility of the witnesses was crucial. Cf., *Judd v. United States*, *supra* at 67, 190 F.2d at 653 (1951); *Channel v. United States*, 285 F.2d 217 (9th Cir. 1960); *Kovach v. United States*, 53 F.2d 639 (6th Cir. 1931).¹⁷ This Court on appeal must, of course, assume the truth of the prosecution's evidence accepted by the trier of fact and give full play to his right to determine credibility, weigh the evidence, and draw legitimate inferences of fact. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *Curley v. United States*, 81 U.S. App. D.C. 389, 392, 397, 160 F.2d 229,

¹⁵ The leading case, which concededly places a heavy burden on the Government, is *Judd v. United States*, 89 U.S. App. D.C. 64, 66, 190 F.2d 649, 651 (1951):

"[S]uch waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. . . . The Government must show a consent that is 'unequivocal and specific', 'freely and intelligently given.'"

¹⁶ Even assuming express consent was more limited, i.e., to the passage through the house to the trash cans, this would still seem to imply consent to seize the articles in the cans and to exit by the same means of ingress. Of course, the plain view doctrine would permit seizure of fruits noticed along the way. Appellant's assertion of bad faith by the officers, needless to say, is unsupported in reason, fact, or finding. See Appellant's Br. at 8. It should not be presumed. Cf., *Abel v. United States*, 362 U.S. 217, 226-230 (1960).

¹⁷ Unlike the cited cases, the present case involves elements in the Government's proof which make out a *prima facie* consent showing. In *Judd* and *Channel* the defendant was in jail when "consent" was obtained; and in *Kovach* the appellate court was not sure what standards had been applied and merely remanded for review on the basis of its enunciated standard. In the present case, however, the warning, the announcement of what the officers had seen, and the other facts and circumstances would appear unequivocally to satisfy the governing standards of consent elucidated by *Judd*, absent appellant's testimony.

232, 237, *cert. denied*, 331 U.S. 837 (1947).¹⁸ The binding facts in the case which the trial court must be deemed to have found include the announcement by the officers to appellant of what they had seen, the warning of his right not to admit them, his expression of consent to their entry to examine the articles in the trash and to their removal of those articles and the ones in the dining room, the entry of only the two named officers onto the premises, together with the other immediate circumstances and legitimate inferences therefrom (M. Tr. 9-11, 22-24; Tr. 18-21, 32-36).¹⁹ See *Trent v. United States*, 109 U.S. App. D.C. 132, 155-156, 284 F.2d 286, 289-290 (1960), and cases there cited.

The essential distinction between the present case and those cited by appellant is the articulation of an effective warning to appellant. We have found only one other recent case in a similar context involving this element. *United States v. Burke*, 215 F. Supp. 508 (D. Mass. 1963), *affirmed*, 328 F.2d 399 (1st Cir. 1964), *cert. denied*, 379 U.S. 849 (1965). There two brothers, though one was under arrest, were held to have validly consented to searches after being fully advised of their rights. In one case, the consent was to the search of a bedroom in the defendant's home. 215 F. Supp. at 512. In the present case, the warning was less extensive than that given before the search of the bedroom in *Burke*, where, however, the warning was also designed to cover oral admissions. *Ibid.* Still there is no reason to regard the warning in the

¹⁸ See also *Ker v. California*, 374 U.S. 23, 43 (1963) (opinion of Clark, J.); *Smith & Cunningham v. United States*, 122 U.S. App. D.C. 300, 304, 353 F.2d 838 (1965). (*Henry W.*) *Jackson v. United States*, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965), is not to the contrary, for it makes a narrow exception without possible application in the present case. It would seem further that the present case would, more than ordinarily, be one in which the impression gained by the trier of fact must affect a judgment on relative credibility. See *Trimble v. United States*, *supra* at 174, 369 F.2d at 563.

¹⁹ These facts would have been necessary to the general findings of the motions and trial judges (M. Tr. 64-65, 68; Tr. 198).

present case as less effective. Indeed, there is a basis to regard the warning here as most thoroughly and effectively comprehended, in view of appellant's actual exercise of his rights in denying the officers permission to enter the upstairs portion of his house without warrant and in having sufficient awareness to have counsel present during the later execution of the search warrant (M. Tr. 25, 61; Tr. 38, 41, 191).

In view of the warning and the other circumstances of the case, it is difficult to conceive how the consent here could be regarded as invalid even under stringent tests. There was no overbearing action by the officers.²⁰ Appellant quite clearly was not overborne.²¹ There are many explanations for his consent quite consistent with the action of a sane and rational criminal.²² Thus, unless this

²⁰ Specifically, there was no demand for entry. See, e.g., *Amos v. United States*, 255 U.S. 313 (1921) (officers announced purpose of searching); *United States v. Marra*, 40 F.2d 271 (W.D.N.Y. 1930) (officers stated they were going to inspect premises); *United States v. Slusser*, 270 Fed. 818 (W.D. Ohio 1921) (officers displayed badge, announced intent to search). There was no threat. See, e.g., *United States v. Marquette*, 271 Fed. 120 (N.D. Cal. 1920) (show of arms); *Waldron v. United States*, 95 U.S. App. D.C. 66, 219 F.2d 37 (1955) (defendant's 18 year-old, pregnant wife told by officers they would not be responsible if had to get warrant). Appellant was not subjected to sustained pressure. See, e.g., *Judd v. United States*, *supra* (defendant under arrest interrogated); *Nelson v. United States*, 93 U.S. App. D.C. 14, 21, 208 F.2d 505, 512 (1953), *cert. denied*, 346 U.S. 827 (uncounseled witness interrogated by congressional committee; "brooding omnipresence of compulsion").

²¹ Of course, appellant's diligent exercise of his rights, noted above, belies any such assertion. His uncowed and unsubdued attitude and background shown by his testimony at trial also support this conclusion. See, e.g., *United States v. Martin*, 176 F. Supp. 262, 267 (S.D. N.Y. 1959) (defendant businessman not likely to be overcome by fear or terror).

²² Under the unusual circumstances of this case, it is too facile a solution to argue, as does appellant, that no sane man denying guilt would do as he did merely because he was aware of the presence of fruits on his premises. *Higgins v. United States*, 93 U.S. App. D.C. 340, 209 F.2d 819 (1954), heavily relied upon by appel-

Court wishes to elevate the *Judd* and *Higgins* rule to the status of a per se rule, the consent here should stand valid.

Finally, we suggest that an abandonment of the articles in the trash cans occurred here, thus in any event depriving appellant of standing to challenge that portion of the seizure. To the extent that entry onto the premises became lawful under the plain view doctrine or by reason of consent, appellant's interest in the privacy of the premises

ant, is limited by its facts, including the fact that defendant was elsewhere than his room when accosted by the officer and that the officer could not confront defendant with specific knowledge of what he had seen on the premises. Thus, the Court there refused to find consent to what can only be regarded as an exploratory search. Here, however, assuming that on being informed appellant was well aware at least of the articles in the trash, it is quite possible he thought the other articles were on the second floor of his house, as the motions judge suggested (M. Tr. 49). This would explain his granting permission only to enter, confident that nothing more than the officers already knew would be discovered. An equally valid hypothesis might conclude that appellant was hopeful and, indeed, confident that his stratagem of inviting seizure of the known articles would deflect suspicion from himself. This is lent support by his hearsay claim, pursued despite the court's ruling at trial, that his wife had told the officers she found the articles in the areaway and brought them on the premises (Tr. 159, 195-196).

For well reasoned cases in point see, e.g., *United States v. Gorman*, 335 F.2d 151 (2nd Cir. 1965) (opinion of Friendly, J.) (refusal to presume non-consent merely because defendant realizes search will disclose damaging evidence, since this would destroy consent principle and enable experienced criminals to trap police by false consents); *United States v. Smith*, 308 F.2d 657 (2nd Cir.), cert. denied, 372 U.S. 906 (1962), citing with approval *United States v. De Vivo*, 190 F. Supp. 483 (E.D.N.Y. 1960) (mistaken belief of defendant of absence of incriminating evidence, valid consent); *United States v. Dornblut*, 261 F.2d 949 (2nd Cir. 1958) (defendant confident of stratagem, valid consent); *United States v. Adelman*, 107 F.2d 497 (2nd Cir. 1939) (likely belief evidence disposed of, valid consent); *United States v. De Ciccio*, 190 F. Supp. 487 (E.D.N.Y. 1961) (defendant confident subject of search could not be found, overlooked other evidence, valid consent); *United States v. Martin*, *supra* (hope by defendant of explaining presence of stolen goods, knowledge it would be found only one factor in determining consent, valid consent).

ceases to be an obstacle.²³ His interest in the property seized from the trash must be viewed in light of his manifested intention to dispose of it permanently. In this view, the present case is closer to the *Abel* and *Hester* cases than to *Work*.²⁴

As to the validity of the search warrant, which we note is not specifically attacked in appellant's brief, it is perhaps sufficient to rest on the assertion that, in setting forth in summary form the testimony given by Detective Seibert in the motion to suppress, it surely meets the probable cause requirements. Even were the earlier seizures to fall, there was sufficient evidence excluding fruits of the poisonous tree to justify the warrant-search conducted.²⁵

²³ Without falling into a circular process of reasoning and justification, it should be noted that this problem may be approached from either direction. That is, while a lawful entry may be easier to find under the plain view doctrine or consent principle *because* of factors including appellant's absence of actual interest in the property sought, by the same token a legal abandonment of the interest in the property may be found *because* of factors including waiver of the privacy in the premises. See, *supra*, footnotes 14 and 16.

²⁴ In *Abel v. United States*, *supra*, at 240-241, the Supreme Court held defendant's interest in the premises terminated upon his checking out of a hotel room on instruction of federal officers after his arrest, thus permitting a finding of abandonment of property within the room. In *Hester v. United States*, *supra*, at 59, the officers' trespass across defendant's father's land did not constitute an invasion because the Fourth Amendment did not extend to open fields, so that incriminating evidence dropped by appellant could be found abandoned. In *Work v. United States*, *supra*, at 239, 243 F.2d at 662, however, there was an invasion of the premises by virtue of actual entry into the building as well as an unconsented search within the curtilage. Furthermore, the Court there found no actual intent to dispose of the property. See, *supra*, footnote 14.

²⁵ The warrant affidavit, which has been designated as part of the record, also sets forth that Det. Seibert observed articles identifiable as Sears property in the trash in the rear yard of 912 First Street, S.E.; that the informer reported having seen appellant take several cartons of merchandise into the premises earlier in the night; and that the general manager of the Mutual Car Pool

In sum, there was here a seizure of stolen objects lying abandoned and in plain view on appellant's premises. Given these unusual circumstances and appellant's expression of consent to the entry intended to accomplish this seizure, we think it cannot be said that appellant's Fourth Amendment rights were violated by unreasonable police action.

- II. The trial court did not abuse its discretion by hearing appellant's testimony on the second motion to suppress in the presence of the jury.

(M. Tr. 64; Tr. 146-147, 156-157, 198)

Appellant claims error in the procedure adopted by the trial court in hearing his testimony on the renewed motion to suppress in the jury's presence during the course of and without interrupting the trial.²⁶ In view of the fact that the motion had been fully heard and denied prior to trial by the motions judge, and no prejudice can be shown, this claim must be regarded as frivolous.²⁷

Agency, Inc., had reported stolen assorted clothing and merchandise belonging to Sears, Roebuck and Co. from a trailer at 80 Eye St., S.E., between 4:30 p.m., July 15, and 3 a.m., July 16. In the Government's view, this alone would validate the search under the warrant.

²⁶ Appellant's Br. 22-27.

Appellant originally urged his second motion to suppress in the form of a general objection only after the trial began (Tr. 12-13, 25). It is significant that at the time that appellant first suggested a hearing without the jury, the Government had already completed its evidence (Tr. 146). When appellant indicated that he had no new evidence and that he planned to take the stand at trial in any event, the court suggested that it reserve decision on the admissibility of the tangible evidence until appellant testified. To this procedure appellant's counsel articulated no specific objection. (Tr. 146-147.)

²⁷ Appellant in support of his claim cites (*Clarence L. Wright v. United States*, 102 U.S. App. D.C. 36, 250 F.2d 4 (1957), and *Bray v. United States*, 113 U.S. App. D.C. 136, 306 F.2d 743 (1962)). These cases, dealing with hearings on voluntariness of confessions, elucidate a unique area and have no bearing on the present issue. In

Denial of a pretrial motion to suppress is not of course binding upon the trial court in all circumstances, and the trial judge did not regard himself as bound here (Tr. 198). See *McNabb v. United States*, 318 U.S. 332, 346 (1943); *Anderson v. United States*, 122 U.S. App. D.C. 277, 352 F.2d 945, 947 (1965); *Rouse v. United States*, 123 U.S. App. D.C. 348, 359 F.2d 1014 (1966). If new evidence or circumstances appearing at trial cast reasonable doubt on the pretrial ruling, it becomes the duty of the trial court to consider *de novo* the issue of suppression and, if necessary, hold a hearing out of the presence of the jury. *Rouse v. United States*, *supra* at 349-350, 359 F.2d at 1015-1016. In the present case, however, no new relevant evidence was proffered or offered by appellant other than his own testimony.²⁸ In fact, the court had before it only a half-articulated request for a hearing without the jury by defense counsel without even specific grounds. (Tr. 146-148.)²⁹ There was no suggestion whatsoever as to the existence of a reason for separate hearing of such evidence as was offered.³⁰ The court, as

neither case was the defendant accorded a pretrial hearing, a rather vital distinction which appellant would have the Court overlook. Here, the evidence had already been determined admissible in a prior proceeding. Moreover, here appellant needed to put no evidence before the jury on the motion that would not be before it at the trial itself. See the preceding footnote. Nor can it be said that the jury was ever made aware that a motion was being heard.

²⁸ Appellant had opportunity to present this at the pretrial hearing, but failed to do so (M. Tr. 64).

²⁹ Clearly, there was insufficient basis to invoke the trial court's discretion under the circumstances. See *Hood v. United States*, 125 U.S. App. D.C. 16, 18, 365 F.2d 949, 951 (1966).

³⁰ Appellant has been unable to show any prejudice resulting from hearing of the second motion and trial testimony at once. His suggestion that he was "compelled" to testify rings false in view of his counsel's statement that appellant planned to take the stand anyway and his total failure to make an issue of such a question. Although the Federal Rules are not applicable, the concurring opinion of Judge McGowan in *Rouse v. United States*, *supra* at 351, 359 F.2d at 1017, is instructive:

"It is, of course, always possible to renew at trial a motion to suppress, but it was not the purpose of Rule 41(e), Fed. R.

it noted, considered the motion anew and denied it, and exercised its discretion not to interrupt the course of trial in so doing (Tr. 198).³¹ Appellant was not prejudiced thereby.

III. The trial court properly instructed on the permissible inference from possession of recently stolen goods.

(Tr. 14, 18, 23, 32-37, 75, 160-161, 163, 176-178, 180-186, 188, 192, 202, 217-219)

Appellant finally claims error in the refusal of the trial court to grant the unwarranted and erroneous written instruction submitted by him on the inference to be drawn from exclusive possession of recently stolen property.³²

The record shows that the court instructed the jury fully and accurately on the meaning of "possession", as well as on the inference which the jury might if it deemed reasonable draw from its finding of possession (Tr. 218-219).³³ Defense counsel at one point indicated satisfac-

Crim. P., customarily to countenance consecutive hearings and dispositions of the same issue, once before trial and once during, absent some new and unusual turn in the evidence at trial. The whole point of the pretrial hearing of motions to suppress is to expedite the trial, even to the point of eliminating the need to hold one at all."

³¹ See *Nardone v. United States*, 308 U.S. 338, 341-342 (1939), stressing the importance of dispatch within the boundaries of appropriate judicial discretion in criminal trials.

³² Appellant's Br. 24-37.

³³ The pertinent portions of the instruction were as follows:

"Now, the charge of receiving stolen property, or property which is the subject of a larceny, is contained in our District of Columbia Code and provides that any person who shall, with an intent to defraud, receive anything of value which shall have been stolen, or obtained by a robbery, knowing or having cause to believe the same to be so stolen, or so obtained by robbery, would be guilty of the crime of receiving stolen property.

Now, you are instructed that where an Information charges receiving stolen property, unexplained possession in the Defendant of property recently stolen may be evidence of guilt, but any inference from such possession is one of fact and not of law, and it is for you, the jury, alone to determine whether

tion with such an instruction on possession (Tr. 202). Moreover, the instruction given was aptly tailored to the facts that the evidence introduced was found not merely in the trash cans, but also in open and obvious view in a part of the house appellant himself occupied at that moment and immediately before, as well as in other parts of the house used by him and his family (Tr. 18, 32-36, 37,

the guilt of a defendant is a reasonable inference of fact fairly deducible from his possession of recently stolen property, and is to be determined by you in the light of all the circumstances, including the reasonableness of the Defendant's explanation, if any, as to how he came by the property.

You must be satisfied beyond a reasonable doubt that the articles in question were stolen, and that they were received by the accused with knowledge that they were stolen and with an intent to defraud the owner, in order to convict him.

If you find that this Defendant was in possession of these goods, which are the subject of the testimony here, and that they had been recently stolen, then you may, if you see fit to do so, infer therefrom that this Defendant is guilty of the offense with which he is charged, unless you find that he has explained to your satisfaction his possession of the goods in question, on the date in question, and under the circumstances stated.

You are further instructed that if you find the Defendant had possession of recently stolen property, such possession can, in the absence of satisfactory explanation, give rise to an inference of guilt of receiving stolen property. As I have stated, this is a question of fact to be determined by you, the jury.

Now, to have possession of something, means to have dominion and control over it. Possession may be either actual or constructive, and if the evidence establishes the necessary power in the Defendant to control something, immediate, physical custody or manual or personal, physical possession is not necessary in order for the Defendant to have possession of it. It is for you, the jury to determine whether the evidence in this case shows that the Defendant had possession of the articles in question.

Mere possession is not enough to establish guilt. The Government must also prove that the Defendant had knowledge that the goods possessed were stolen. Now, this may be done by circumstantial, as well as by direct evidence. It is impossible to prove by direct evidence the workings of a man's mind. Possession of stolen goods shortly after the theft may give rise to an inference that the goods were stolen, as I have told you." (Tr. 217-219.)

163, 180-186, 188, 192). We point out that the fruits were found within a maximum of ten and a half hours after the commission of the offense, and probably less (Tr. 14, 18, 75). Appellant's claim of alibi was totally uncorroborated, and his repeated claim to have had no knowledge whatsoever of any of the articles was, we submit, so patently false in the circumstances as to be unmistakable to the jury (Tr. 160, 176-177, 178; 23, 32-36, 161, 182). Thus, the jury had more than adequate basis in law and reason on which to find its verdict. Appellant misconstrues the law of this jurisdiction in concluding that to warrant the inference of guilt of a larceny-type charge the possession of recently stolen goods must be exclusive in the one charged. Although some cases in this jurisdiction have employed the term "exclusive",³⁴ most omit it,³⁵ and it is clear that the cases do not require it.³⁶ Moreover, research has disclosed no holding in a local case on use of the term "exclusive" which provides an analysis of its need or correctness.³⁷ And it must be pointed out

³⁴ See, e.g., *Rivera v. United States*, 124 U.S. App. D.C. 99, 100-102, 361 F.2d 553, 554-555 (1966) (dissenting opinion); *Travers v. United States*, 118 U.S. App. D.C. 276, 335 F.2d 698 (1964); *McKnight v. United States*, 114 U.S. App. D.C. 40, 309 F.2d 660 (1962); (*John*) *Wright v. United States*, 89 U.S. App. D.C. 70, 189 F.2d 699 (1951); *Edwards v. United States*, 78 U.S. App. D.C. 226, 139 F.2d 365 (1944); *Tractenberg v. United States*, 53 App. D.C. 396, 293 Fed. 476 (1923).

³⁵ See, e.g., *Wilson v. United States*, 162 U.S. 613 (1896); *McNamara v. Henkel*, 226 U.S. 520 (1913); (*Fletcher*) *Smith v. United States*, 123 U.S. App. D.C. 259, 359 F.2d 243 (1966); *Smith & Anderson v. United States*, 118 U.S. App. D.C. 235, 335 F.2d 270 (1964); *Bray v. United States*, 113 U.S. App. D.C. 136, 306 F.2d 743 (1962); *McAbee v. United States*, 111 U.S. App. D.C. 74, 294 F.2d 703 (1961); *Inman v. United States*, 100 U.S. App. D.C. 150, 243 F.2d 256 (1957) (receiving stolen property case); *Gilbert v. United States*, 94 U.S. App. D.C. 321, 215 F.2d 334 (1954).

³⁶ Of course, the extent of amplification of an instruction is within the trial judge's discretion. See *United States v. Bayer*, 331 U.S. 532 (1947).

³⁷ See, *supra*, footnote 34. But cf., *Rivera v. United States*, *supra* (dissenting opinion). In that case, however, there was evidence of

that the instruction requested by appellant at trial goes far beyond simple use of that term and grossly misstates the law.³⁸

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District of Columbia Court of Appeals should be affirmed.

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actual possession in others than the defendant, and evidence of knowledge by the defendant was weak.

Needless to add, we question the value of the analysis provided by appellant suggesting the concept of possession to be required for proof of the crime here. A requirement of "exclusive" possession where two or more persons share possession of a stolen object would preclude the jury from drawing an inference of guilt against either or any of them. Surely, where there exists a joint possession, as here, the Government need not prove the negative of the proposition against others in order to prove the positive against appellant. Yet this is what a requirement of exclusive possession demands. In such circumstances, we submit, the jury should be permitted to draw its inference of guilt based not only on possession but perhaps focussed as well on other elements like knowledge and responsibility. The jury here was enabled to do just that, and undoubtedly did it.

³⁸ See appellant's instruction quoted at Br. 4. There is no rule that possession must be explained to sustain the inference. The rule speaks of a "satisfactory explanation". See *e.g.*, (*Fletcher*) *Smith v. United States*, *supra*. Similarly, "personal" possession, "distinct and conscious assertion" of property are not required.